Out of the Shadows, Into the Light: Preventing Workplace Discrimination Against Medical Marijuana Users

By Elizabeth Hurwitz*

Introduction

JANE SMITH[1] is an Iraq War veteran. After returning home from her last tour of duty, she began to experience severe psychological and emotional trauma. Months later she was diagnosed with severe depression and Post-Traumatic Stress Disorder ("PTSD") as a result of her service. After several years of therapy and a wide array of ever-changing prescription medications her doctor recommended that she try medical marijuana to help ease the depression, anxiety, and insomnia related to her disorder. Medical marijuana has worked for Jane, giving her the ability to function, socialize, and work like a person without PTSD. Now able to hold a job, she faces discrimination in the form of pre-employment drug testing which uncovers her marijuana use. Although that use has been decriminalized under California state law, there have been no laws preventing employment discrimination based on use of medical marijuana or one's status as a qualified patient. The fact that marijuana remains a Schedule I narcotic under the federal Controlled Substances Act makes it more difficult to have employers voluntarily offer an accommodation to pre-employment drug testing for qualified patient employees.[2] Jane and the thousands of other qualified patients in California face a difficult choice: forego the legal medication to manage their symptoms or hold a job in order to provide for themselves and their families.

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1. Name and gender have been changed to protect privacy.

2. *Drug Scheduling*, U.S. Drug Enforcement Admin., http://www.justice.gov/dea/pubs/scheduling.html (last visited July 5, 2011).

In 1996, California voters approved Proposition 215, now commonly known as the Compassionate Use Act ("CUA").[3] The CUA removed state criminal sanctions for marijuana possession, cultivation, or use by qualified patients or their caregivers with a doctor's recommendation.[4] California's CUA has generated a large amount of controversy since its passage fifteen years ago. Among the questions raised by the CUA is whether the CUA requires employers to make accommodations to their drug policies for qualified patient employees that use medical marijuana off-duty and off-premises. The California State Supreme Court expressly held in *Ross v. RagingWire Telecommunications, Inc.* that employers do not have to accommodate such use, even if the employee's job performance was in no way impeded by the employee's use of medical marijuana.[5]

Recently, California State Senator Mark Leno (D-San Francisco) introduced Senate Bill 129 ("S.B. 129").[6] If passed and signed into law, S.B. 129 would require employers to accommodate off-duty, off-premises medical marijuana use by qualified patient employees who do not hold a position implicating public safety.[7] S.B. 129 would change the legal landscape of California in the area of medical marijuana regulation by overturning the *Ross* decision and imposing the obligation to make accommodations to drug-testing policies for qualified patient employees upon employers. In addition to changing business as usual for California employers, the bill also faces the potential obstacle of preemption by federal drug policy. Congress has the power to preempt state legislation in a variety of areas, including drug laws.[8]

This Comment argues that S.B. 129 should be passed by the California Legislature and should be signed into law in California. While S.B. 129 will affect employers in California, the risks to employers and the public are small, and the benefits to qualified patient employees are vast. This Comment also explores federal preemption of state drug policy and argues that S.B. 129, if passed, will not be preempted by federal law and is strongly supported by public policy.

3. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007), *limited on preemption grounds by* United States v. Landa, 281 F. Supp. 2d 1139 (N.D. Cal. 2003).

4. *Id.* § 11362.5(b)(1)(B).

5. Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 206–07 (Cal. 2008).

6. S.B. 129, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (amending the Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.785, and adding section 11362.787).

7. *Id.*

8. U.S. CONST. art. VI, cl. 2.

Part I of this Comment explores current California law and examines the changes that the passage of S.B. 129 will make in the legal landscape. Part II examines the question of federal preemption and demonstrates why S.B. 129 would not be preempted by federal drug policy. Part III examines the public policy reasons supporting the passage of this bill and demonstrates the benefit the bill will bring to California.

I. Current California Law and the Likely Effect of the Passage of S.B. 129

A. The Compassionate Use Act of 1996 and the Medical Marijuana Program Act

On November 5, 1996 California voters approved Proposition 215, which added section 11362.5 to the Health and Safety Code.[9] Known as the Compassionate Use Act, this section ensures that "patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."[10] The term "qualified caregiver" is defined by the CUA as the person who has consistently assumed the responsibility to ensure the safety of or to provide housing or medical care for the qualified patient.[11] The CUA was the first law decriminalizing medical marijuana use by qualified patients in the United States.[12] Since the CUA's enactment, sixteen states and Washington D.C. have passed laws legalizing medical marijuana use by qualified patients.[13]

9. Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

10. *Id.* § 11362.5(b)(1)(B).

11. *Id.* § 11362.5(e).

12. *California's Medical Marijuana Laws*, AMS. FOR SAFE ACCESS, http://www.safeaccessnow.org/article.php?id=5975 (last visited July 5, 2011).

13. *Active State Medical Marijuana Programs*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/index.cfm?Group_ID=3391 (last visited July 14, 2011); ALASKA STAT. § 17.37 (2010); ARIZ. REV. STAT. ANN. § 36-2801 (West, Westlaw through the First Regular Session and Third Special Session of the Fiftieth Legislature (2011)); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007); COLO. REV. STAT. § 25-1.5-106 (2008); D.C. CODE § 7-1671.02 (Lexis 2010); S.B. 17, 146th Gen. Assemb. (Del. 2011); HAW. REV. STAT. § 329-122 (Supp. 2009); ME. REV. STAT. ANN. tit. 22, § 2422 (West 2010) (repealed 2010); MICH. COMP. LAWS § 333.26421 (West 2011); MONT. CODE ANN. § 50-46-201 (2010); NEV. REV. STAT. § 453A (2009); N.J. STAT. ANN. § 24:6I-1 (West 2011); N.M. STAT. ANN. § 26-2B (2007); OR. REV. STAT. § 475.300 (2009); R.I. GEN. LAWS § 21-28.6-4 (Lexis 2010); VT. STAT. ANN. tit. 18, § 4474 (Lexis 2010); WASH. REV. CODE § 69.51A.040 (2007).

The CUA was interpreted by the California Supreme Court in *People v. Mower*[14] to grant persons charged with possession of marijuana a "limited immunity from prosecution . . . allow[ing] a defendant to raise his or her status as a qualified patient . . . as a defense at trial, . . .[or] to raise such status by moving to set aside an indictment . . . prior to trial" on the ground of the absence of probable cause to believe that the medical marijuana user was guilty.[15] The court further held that while the defendant should bear the burden of proving such a defense, the defendant would only be required to raise a reasonable doubt as the fact of their immunity, rather than having to prove it by a preponderance of the evidence.[16] This holding has allowed qualified patients to prove their status in court and have the case against them dismissed, preventing them from being branded with a drug record. However, qualified patients still faced arrest and the disruption of going to court as a result of their legal possession or use of medical marijuana.

In 2003, the California State Legislature passed Senate Bill 420 ("S.B. 420")[17] to address these problems. S.B. 420 added article 2.5 to section 11362.7 of the California Health and Safety Code.[18] Section 11362.7, article 2.5, known as the Medical Marijuana Program Act ("MMP"), established a state mandate requiring the California Department of Health Services to create and oversee a voluntary program for the issuance of identification cards for qualified medical marijuana patients authorizing them to engage in the medical use of marijuana.[19] One provision of the MMP imposed on counties an obligation to "implement a program permitting a limited group of persons—those who qualify for exemption from California's statutes criminalizing certain conduct with respect to marijuana—to apply for and obtain an identification card verifying their exemption."[20] The purpose of this requirement was to "facilitate the prompt identification of qualified patients and their designated primary caregivers in

14. 49 P.3d 1067 (Cal. 2002).

15. *Id.* at 1070.

16. *Id.* at 1071.

17. 2003 Cal. Stat. ch. 875 § 2.

18. Medical Marijuana Program Act, CAL. HEALTH & SAFETY CODE §§ 11362.7–11362.9 (West 2007).

19. *Id.* § 11362.71(a)(1).

20. County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 467 (Ct. App. 2008).

order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers."[21]

While obtaining an identification card is a voluntary act, participation in the program provides significant benefits to the patient or caregiver. Patients who are otherwise in compliance with the CUA and who carry an identification card are not subject to arrest for violating California law regarding the transportation, delivery, or cultivation of marijuana,[22] and the program provides law enforcement a twenty-four hour call center that will verify the validity of the cardholder's status.[23] The identification card also has a picture of the cardholder and identifying characteristics on the face of the card to allow for ease of identification and prevention of arrest.[24]

The MMP sets forth a number of definitions that were absent from the original text of the CUA, including a definition of what constitutes a "serious medical condition" which would qualify someone to obtain medical marijuana. In addition to the ten conditions specifically enumerated (including AIDS, cancers, migraines, and severe nausea)[25] the MMP defines a serious medical condition as:

> [A]ny other chronic or persistent medical symptom that either: Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990, [or which] if not alleviated may cause serious harm to the patient's safety or physical or mental health.[26]

This expansive definition of a qualifying medical condition has allowed many people to obtain a physician recommendation for medical marijuana. The California Department of Public Health website states that in the seven years since the implementation of the MMP identification card program, 55,193 cards have been issued.[27] As obtaining an identification card is voluntary on the part of the patients, the total number of medical marijuana users in California is hard to accurately state, and it is equally impossible to know how many of these qualified patients have been denied employment due to their use of medical marijuana. The American Management Association,

21. *Id.* at 468–69.

22. Medical Marijuana Program Act, CAL. HEALTH & SAFETY CODE § 11362.71(e) West 2007).

23. *Id.* § 11362.71(a)(2).

24. *Id.* § 11362.735(a)(5).

25. *Id.* § 11362.7 (h)(1)–(11).

26. *Id.* § 11362.7(h)(12)(A)–(B).

27. *Medical Marijuana Program Card Information*, CAL. DEP'T OF PUB. HEALTH, http://www.cdph.ca.gov/programs/MMP/Pages/MMPCardDATA.aspx (last visited July 14, 2011).

however, estimates that seventy-six percent of employers require pre-employment drug screening, making it likely that many qualified patients have been discriminated against in the terms and conditions of employment.[28]

The MMP states that "[n]othing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment."[29] While it is certainly possible that some employers chose to accommodate such use, voluntary accommodations were certainly not the norm. Without clear guidance on the obligations of employers in the state, the time was ripe for judicial clarification.

B. *Ross v. RagingWire Telecommunications*

In *Ross v. RagingWire Telecommunications, Inc.*, the California Supreme Court held that employers are not required to accommodate a qualified employee's off-duty, off-premises use of medical marijuana.[30] Plaintiff Gary Ross suffered a back injury while serving in the United States Air Force.[31] The injury left Ross suffering muscle spasms and chronic back pain.[32] Due to his condition, Ross was a qualified individual with a disability under the California Fair Employment and Housing Act ("FEHA")[33] and received government disability benefits.[34] Beginning in September 1999, due to his inability to obtain pain relief through traditional medications, Ross began using marijuana on his physician's recommendation pursuant to the CUA.[35]

On September 10, 2001, Ross was offered a job by defendant RagingWire Telecommunications, Inc. ("RagingWire") as a lead systems administrator, conditioned on Ross passing a urinalysis drug test.[36] Prior to the urinalysis, Ross gave the testing center a copy of his physi-

28. Bob Rosner, Allan Halcrow & Alan Levins, *Corner Office: Drug Tests for Employees?*, ABC NEWS (July 16, 2002), http://abcnews.go.com/Business/CornerOffice/story?id=87050&page=1.

29. Medical Marijuana Program Act, CAL. HEALTH & SAFETY CODE § 11362.785(a) (West 2007).

30. Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 206–07, 209 (Cal. 2008).

31. *Id.* at 203.

32. *Id.*

33. Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12920–12921 (West 1992).

34. *Ross*, 174 P.3d at 203.

35. *Id.*

36. *Id.*

cians recommendation for marijuana.[37] One week later, Ross was informed by the testing center that his sample had tested positive for tetrahydrocannabinol, the active component of marijuana.[38] Ross gave RagingWire's human resources director a copy of his physician's recommendation for marijuana and explained that he used marijuana for medical purposes.[39] The following day RagingWire's board of directors met to discuss the situation and several days later, informed Ross he was being fired due to his marijuana use.[40]

Ross filed suit, alleging RagingWire violated the FEHA by terminating him for his disability and by failing to make a reasonable accommodation for his disability.[41] Ross further alleged that RagingWire had wrongfully terminated him in violation of public policy.[42] Ross claimed his disability and use of marijuana did not impede his performance of the essential functions on the job for which he had been hired and that he had worked in the same field since he began using marijuana without any complaints about his job performance.[43] The California Supreme Court denied Ross's claim, finding that the CUA did not give marijuana the same status as a legal prescription drug.[44] Rather, the court found that "California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designed statutes."[45] The court also stated that nothing in the CUA's text or history "suggests the voters intended the measure to address the respective rights and obligations of employers and employees," but merely to remove criminal sanctions from the use or possession of marijuana by qualified patients.[46]

The majority relied heavily on the reasoning of *Loder v. City of Glendale* where the court had previously held that employers could reasonably require prospective employees to be tested for illegal drug and alcohol use and access the test results.[47] The *Loder* court specifically stated that employers could condition an offer of employment on the results of a medical examination and that such examinations

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 204.
45. *Id.*
46. *Id.*
47. Loder v. City of Glendale, 927 P.2d 1200, 1203 (Cal. 1997).

may reasonably include drug testing.[48] In so holding, the court recognized that an employer's interest in the results of such tests was legitimate "in light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees."[49] These problems included absenteeism, unsafe working habits, and high turnover rate.[50]

The *Ross* court rejected Ross's argument that failure to require employers to accommodate marijuana use from their drug testing policies would severely undercut the rights granted to qualified patients under the CUA.[51] The court found that the only right granted by the CUA was the freedom from state criminal sanctions for possession or use by qualified patients, stating that "[a]n employer's refusal to accommodate an employee's use of marijuana does not affect . . . the immunity to criminal liability provided in the act."[52] Thus, the rights granted to qualified patients under the CUA would not be undermined by failing to require employers to make this accommodation.

Ross next argued that the MMP required accommodations of off-duty, off-premises marijuana use because of the language in section 11362.785(a), which states, "[n]othing in this article shall require any accommodation of any medical use of marijuana *on the property or premises of any place of employment or during the hours of employment*."[53] Ross reasoned that the legislature added this language specifically to imply that off-site, non-working hours medical marijuana use must be tolerated by employers.[54] The court rejected this construction, stating that "[e]ven without inferring a requirement of accommodation, the statute can be given literal effect as negating any expectation that the immunity to criminal liability for possessing marijuana granted in the [CUA] gives medical users a civilly enforceable right to possess the drug at work."[55] The court refused to agree with Ross that the language of the MMP imposed an obligation on employers to accommodate qualified patient employees.[56]

48. *Id.* at 1211.

49. *Id.* at 1223.

50. *Id.*

51. *See Ross*, 174 P.3d at 205–06.

52. *Id.* at 206.

53. Medical Marijuana Program Act, CAL. HEALTH & SAFETY CODE § 11362.785(a) (West 2007) (emphasis added).

54. *Ross*, 174 P.3d at 207.

55. *Id.*

56. *Id.*

The court further rejected the amicus brief of five state legislators who authored the MMP, which stated that the legislators "believed that this statutory enactment clearly and sufficiently expressed [their] belief that the FEHA *does* require employers generally to accommodate off-duty, off-premises medical cannabis use by their employee's, absent undue hardship."[57] The court found that because the entire legislature did not share same view as the *amici curiae*, the court had no basis for imputing the authors' views to the entire legislature.[58]

The court erred in refusing to interpret the MMP as it was authored in the legislature. The specific exemption from protection during the hours of employment and on the work site clearly imply that an employer would be required to accommodate medical marijuana use off-duty and while away from the place of employment. The court also rejected Ross's contention that he had been terminated in violation of public policy, finding that the CUA did not indicate any intention to articulate fundamental public policy concerning marijuana use in an employment context or requiring employers to accommodate marijuana use by their employees.[59] Without the implication of a fundamental public policy and because the CUA did not provide notice to employers that this type of termination would violate public policy, Ross's claim of a termination in violation of public policy failed. Under the majority holding, RagingWire's discrimination against Ross became the accepted rule in California.

Justice Kennard authored a concurring and dissenting opinion in *RagingWire*. While she agreed with the majority that Ross's claim of termination in violation of public policy must fail, she nevertheless found that the FEHA would have prevented Ross's termination.[60] Justice Kennard stated that she would have held:

> Unless an employer can demonstrate that an employee's doctor-approved use of marijuana under the Compassionate Use Act while off-duty and away from the jobsite is likely to impair the employer's business operations in some way . . . the employer's discharge of the employee is disability discrimination prohibited by the state Fair Employment and Housing Act.[61]

Justice Kennard argued that the majority's holding defeated the central purpose of the CUA—to allow the medically prescribed use of

57. Brief of Amici Curiae of California Legislators in Support of Petitioner at 2, *Ross*, 174 P.3d 200 (Cal. 2008) (No. S138130).

58. *Ross*, 174 P.3d at 208.

59. *See id.* at 205–06.

60. *Id.* at 209–10 (Kennard, J., dissenting).

61. *Id.*

marijuana without fear of sanctions—and found that the majority's interpretation imposed a "cruel choice" on seriously ill Californians—"continue receiving the benefits of marijuana use . . . and become unemployed, . . . or continue in their employment . . . and try to endure their chronic pain or other condition for which marijuana may provide the only relief."[62] In this statement Justice Kennard summed up the difficult decision faced by Ross, Jane Smith, and other qualified patients in California.

Justice Kennard disagreed with the majority's view that accepting the off-duty, off-premises use of marijuana by an employee was not a reasonable accommodation required by the FEHA because marijuana remains illegal under federal drug policy.[63] In finding that there was no support for this position, she argued that "determining whether an employee-proposed accommodation is reasonable requires consideration of its benefits to the employee . . . , the burdens it would impose on the employer and other employees, and the availability of suitable and effective alternative forms of accommodation."[64] Rejecting the consideration of federal law in determining the reasonableness of a proposed accommodation, Justice Kennard stated the reasonableness determination turns on how it would affect RagingWire's legitimate interests as an employer, and more specifically, whether it would impose an "undue hardship"—defined as "an action requiring significant difficulty or expense"[65]—on the operations of RagingWire's business. Her construction would require RagingWire to demonstrate that Ross's off-duty, off-premises use of marijuana would adversely impact its business operations. Justice Kennard also demonstrated that the majority's reliance on federal drug policy to reject Ross's accommodation request was misguided in this case. The majority should have conducted the traditional balancing of interests test to determine the reasonableness of Ross's request and any potential burden on the employer.[66] Under this framework Ross should have been granted an accommodation.[67]

62. *Id.* at 211.

63. *Id.* at 212.

64. *Id.*

65. *Id.* at 213.

66. *See id.* at 209–10 (reasoning that under FEHA "determining whether an employee-proposed accommodation is reasonable requires consideration of its benefits to the employee . . . , the burdens it would impose on the employer and other employees, and the availability of suitable and effective alternative forms of accommodation").

67. *Id.* at 213.

In its defense, RagingWire cited the California Drug-Free Workplace Act of 1990[68] which requires employers receiving government contracts or subsidies to certify that they provide "a site . . . at which employees of the entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance."[69] RagingWire argued that under the authority of the California Act and the substantially similar authority of the federal Drug-Free Workplace Act,[70] accommodating Ross's off-duty use of marijuana could negatively implicate its ability to gain state agency contracts or federal grants.[71] Justice Kennard roundly rejected RagingWire's argument, finding:

> The drug-free workplace laws are not concerned with employee's possession or use of drugs like marijuana away from the jobsite, and nothing in those laws would prevent an employer that knowingly accepted an employee's use of marijuana as a medical treatment at the employee's home from obtaining drug-free workplace certification.[72]

Finding there to be no evidence supporting the claim that Ross's doctor-recommended use of marijuana would necessarily or likely have substantial adverse effects on RagingWire's business operations, Justice Kennard found Ross's complaint to state a cause of action under the FEHA for failure of the employer to make a reasonable accommodation to existing employment policies.[73] Without a compelling reason why the accommodation could not be made, Ross's accommodation request should have been granted.

Justice Kennard also rejected the majority's reliance on the *Loder* decision, as the policy at issue in *Loder* was testing for the presence of drugs "for which the applicant [had] no legitimate medical explanation."[74] Justice Kennard found that because Ross's use was legal and medically explained, there was no risk of the abuses and adverse job performance concerns that were at issue in *Loder*, where the plaintiff had no medical explanation for his drug use. Justice Kennard stated that the FEHA requires an employer to accommodate the use of a wide variety of drugs that can impair job performance, including Vicoden, Ritalin, OxyContin, and Valium, and so Justice Kennard had

68. CAL. GOV'T CODE §§ 8350–8357 (West 2005).

69. *Id.* § 8351(a).

70. Drug Free Workplace Act of 1988, 41 U.S.C. § 701 (2006), *amended by* Act of Jan. 4, 2011, Pub. L. No. 111-350, 124 Stat. 3677, 3827–28.

71. *Ross*, 174 P.3d at 213 (Kennard, J., dissenting).

72. *Id.*

73. *Id.*

74. *Id.* (citing Loder v. City of Glendale, 927 P.2d 1200, 1205 (Cal. 1997)).

no difficulty in determining that the FEHA would also require the accommodation of off-site, off-premises medical marijuana use.[75] Because the risks associated with illegal drug use in the workplace are not attributed to over-the-counter or prescription medications, Justice Kennard found that the risks should not be attributed to medical marijuana because it qualifies as a prescription medication in California.

The holding of the majority in *Ross* allowed employers to discriminate against qualified patients who would not choose to forego medical marijuana use. Justice Kennard was correct in her dissenting opinion that the voters of California could not have thought they were decriminalizing medical marijuana use while still allowing users to be punished in the workplace. The majority opinion in this case was in error and requires legislative correction. In immediate response to the *Ross* decision, Senator Mark Leno authored a bill in 2008 to prohibit discrimination against qualified patient employees. A.B. 2279, substantially similar to the current S.B. 129, passed both houses but was vetoed by then-Governor Schwarzenegger.[76] Senator Leno has recently sought to re-introduce legislation to end workplace discrimination towards qualified patient employees and to overturn the *Ross* decision.

C. The Proposed S.B. 129

On January 27, 2011 Senator Leno introduced S.B. 129.[77] If passed, S.B. 129 would amend section 11362.785 and add section 11362.787 to the California Health and Safety Code to "declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person, if the discrimination is based upon the person's status as a qualified patient or a positive drug test for marijuana."[78] The bill further provides a civil cause of action to any person who has suffered such discrimination and provides for remedies of damages, injunctive relief, reasonable attorney's fees and costs, and any other equitable relief the court deems proper.[79] The bill does not grant a blanket right to use marijuana to all workers all the time. It specifically does not prohibit an employer from "terminating the employment of,

75. *Id.* at 214–15.

76. Office of Senate Floor Analyses, Cal. State Senate, Third Reading of S.B. 129 at 4, *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0101-0150/sb_129_cfa_20110411_105426_sen_floor.html.

77. S.B. 129, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

78. *Id.*

79. *Id.*

or taking other corrective action against an employee who is impaired on the property or premises of the place of employment, or during the hours of employment, because of the medical use of marijuana."[80] This provision protects the legitimate interests of employers of ensuring their workforce is able to perform their essential job functions. It also provides a way for an employer to take corrective action against an employee exploiting the privilege of medical marijuana by being inebriated at work while still safeguarding the choices of qualified patient employees.

S.B 129 also exempts from its coverage persons who work in "safety-sensitive" positions.[81] The bill defines such a position as "[a] position in which medical cannabis-affected performance could clearly endanger the health and safety of others."[82] The bill outlines three factors which must be present to define a safety-sensitive position:

> (A) Its duties involve a greater than normal level of trust, responsibility for, or impact on the health and safety of others
> (B) Error in judgment, inattentiveness, or diminished coordination, dexterity, or composure while performing its duties could clearly result in mistakes which would endanger the health and safety of others
> (C) An employee in a position of this nature works independently, or performs tasks of a nature that it cannot safely be assumed that mistakes like those described in subparagraph (B) could be prevented by a supervisor or other employee.[83]

The exemption extends to any position involving the performance of a "safety-sensitive function" as described by section 655.4 of title 49 of the Code of Federal Regulations[84] ("C.F.R.") and to persons holding positions in law enforcement, as defined by section 13951 of the California Government Code.[85]

Section 655.4 of the C.F.R. applies to any person employed by a grant recipient, sub-recipient, or contractor whose duties are enumerated in the statute.[86] Such duties include carrying a firearm for security purposes, operating a revenue service vehicle, operating a nonrevenue service vehicle when such operation requires a Commercial Driver's License, controlling the movement of revenue service ve-

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. 49 C.F.R. § 655.4 (2010).
85. CAL. GOV'T CODE § 13951(d) (West 2005).
86. 49 C.F.R. § 655.3.

hicles, or maintaining or repairing a revenue service vehicle of equipment used in revenue service.[87] Section 13951 of the California Government Code defines "law enforcement" to mean:

> [E]very district attorney, municipal police department, sheriff's department, district attorney's office, county probation department and social services agency, the Department of Justice, the Department of Corrections, the Department of Youth Authority, the Department of the California Highway Patrol, the police department of any campus of the University of California, California State University, or community college, and ever agency of the State of California expressly authorized by statute to investigate or prosecute law violators.[88]

Those exempted from coverage by S.B. 129 include bus drivers, pilots, police officers, paramedics, fire fighters, and security guards.[89] These restrictions on the application of S.B. 129 are reasonable and serve to demonstrate the lack of impact the passage of S.B. 129 will have on employers or the public safety. Any employer who can show that their employees fall into the category of workers with "safety sensitive" functions will not need to comply with the provisions of S.B. 129, meaning that public safety would not be implicated by the amendment.

These restrictions do deprive a certain subset of qualified patients the same rights as other qualified patients. However, the exempted employees have jobs that could implicate the public safety in a serious way. It is not unreasonable to expect a higher level of responsibility from an ambulance driver than the level of responsibility expected from a person who operates a cash register. One of them will have to make split second decisions concerning another person's life in the course of performing their job, while the other will not. Studies have shown that in some people the effects of marijuana can take days or, in very extreme cases, weeks to subside.[90] An employee whose job requires decisions and actions taken to protect public safety should not be able to use a product at home which could be a danger to the public the next day. Arguments could certainly be made that such employees are allowed to take Benadryl or other over-the-counter medications, which could negatively impact their thinking at work, but that discussion is beyond the scope of this Comment.

The changes to the legal landscape in California if S.B. 129 is signed into law would be very small, as would the practical effects on

87. *Id.* § 655.4.

88. GOV'T § 13951(d).

89. S.B. 129, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

90. NAT'L INST. ON DRUG ABUSE, NIDA INFOFACTS: MARIJUANA, http://www.drugabuse.gov/PDF/InfoFacts/Marijuana.pdf (last visited Apr. 25, 2011).

most employers. Overturning the *Ross* decision means employers could not fire or refuse to hire someone who tested positive for marijuana if that person had a valid physician's recommendation. However, as clearly delineated in S.B. 129, employers would also not be forced to accommodate employees under the influence of marijuana at work.[91] As Justice Kennard pointed out in her dissenting opinion, employers would not face decertification under California's Drug Free Workplace Act, since the act only prohibits employers from tolerating use or possession of drugs in the workplace and during working hours.[92]

Overturning the *Ross* decision through S.B. 129 would not impose too heavy of a burden on California employers, but it would significantly improve the lives of hundreds of thousands of qualified patients. Despite the benefits of S.B. 129, a second potential obstacle for the full implementation of S.B. 129 is the possible preemption by federal law.

II. Potential Federal Preemption Problems

A. Definitions and Examples of Preemption

The Supremacy Clause of the U.S. Constitution states that the Constitution and federal laws made in pursuance of the Constitution "shall be the supreme Law of the Land."[93] It is well established that Congress has the power to preempt state law through the Supremacy Clause and that state laws which conflict with federal laws are without effect and void. Courts have traditionally used the Supremacy Clause to ensure the uniform application of federal law and policy in the face of conflicting state policies.[94] The clause has been called "the most important guarantor of national union. It assures that the Constitution and federal laws and treaties take precedence over state law and binds all judges to adhere to that principle in their courts."[95]

In *County of San Diego v. San Diego NORML*[96] the California Court of Appeal for the Fourth District considered the question of federal preemption of the implementation of the MMP identification card

91. CAL. HEALTH & SAFETY CODE § 11362.785(a) (West 2007).

92. Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 213 (Cal. 2008) (Kennard, J., dissenting).

93. U.S. CONST. art. VI, cl. 2.

94. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540–53 (2001).

95. *Constitution of the United States*, U.S. SENATE, http://www.senate.gov/civics/constitution_item/constitution.htm#a6 (last visited Apr. 25, 2011).

96. 81 Cal. Rptr. 3d 461 (Ct. App. 2008).

system. The County of San Diego argued that issuance of the identification cards was preempted by the Controlled Substances Act[97] ("CSA").[98] In considering the preemption question, the court discussed the traditional framework for examining conflicts between state and federal law.[99] Starting with the statement that the "purpose of Congress is the ultimate touchstone of pre-emption analysis"[100] the *NORML* court cited the California Supreme Court as having identified the

> [F]our species of federal preemption: express, conflict, obstacle, and field. First, express preemption arises when Congress "define[s] explicitly the extent to which its enactments preempt state law." . . . Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. Third, obstacle preemption arises when "'under the circumstances of [a] particular case [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Finally, field preemption, i.e., "Congress' intent to preempt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."[101]

Courts determining the possible preemption of a state law look specifically to the intent of Congress in enacting the federal scheme to determine which species of preemption, if any, will apply. There is also, however, a traditional presumption against preemption in the courts and generally otherwise valid state laws will only be found to be preempted when a federal statute specifically states that it displaces any attempt by states to legislate in a particular area.[102] This presumption against preemption is especially strong when "Congress legislates in a field which the States have traditionally occupied."[103]

97. Controlled Substances Act, 21 U.S.C.A. §§ 801–971 (West 1999 & Supp. 2011).

98. County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 467 (Ct. App. 2008).

99. *Id.* at 475–78.

100. *Id.* at 475.

101. *Id.* at 475–76 (citations omitted) (quoting Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569 (Cal. 2007)).

102. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996).

103. *San Diego NORML*, 81 Cal. Rptr. 3d. at 478–79.

B. Federal Laws Which May Preempt S.B. 129

1. The Controlled Substances Act

The 1937 Marihuana Tax Act[104] ("MTA") was the first significant federal regulation of marijuana. While the MTA did not outlaw marijuana per se, it imposed registration and reporting requirements on every person who imported, produced, sold, or dealt in marijuana, imposed an annual marijuana tax, and imposed a transfer tax to be levied every time marijuana changed hands.[105] Noncompliance with the tax scheme resulted in the imposition of severe federal penalties, and failure to comply with the reporting and administrative requirements could result in prosecution under state drug laws.[106] In 1970 Congress consolidated the drug laws and enhanced federal drug enforcement by enacting the Comprehensive Drug Abuse Prevention and Control Act. Title II of the Act is the CSA.[107] The CSA repealed most of the earlier drug laws and established a regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance, except as otherwise authorized by the CSA.[108]

The CSA states that it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice."[109] The exception regarding a doctor's prescription or order does not apply to any controlled substance that has been classified as a Schedule I narcotic,[110] including marijuana.[111] Schedule I narcotics are classified as such due to their "high potential for abuse,"[112] the lack of "accepted medical use in treatment in the United States,"[113] and the lack of acceptable safety protocols for using the drug, even under medical supervision.[114] Under federal law, possession of marijuana for personal use is punishable by up to one year in prison,[115]

104. Marihuana Tax Act of 1937, 50 Stat. 551, *repealed by* Controlled Substances Act of 1970, Pub. L. No. 91-513, tit. II, 84 Stat. 1242.

105. Gonzales v. Raich, 545 U.S. 1, 11 (2005) (quoting Leary v. United States, 395 U.S. 6, 14–16 (1969)).

106. *Id.* (citing Leary v. United States, 395 U.S. 6, 19 (1969)).

107. 21 U.S.C.A. §§ 801–971 (West 1999 & Supp. 2011).

108. *Id.* § 841(a)(1).

109. *Id.* § 844(a).

110. *Raich*, 545 U.S. at 14.

111. 21 U.S.C. § 812(c), sched. I, at (c)(10) (2006).

112. *Id.* § 812(b)(1)(A).

113. *Id.* § 812(b)(1)(B).

114. *Id.* § 812(b)(1)(C).

115. *Id.* § 844(a).

and the statutory scheme of the CSA has been interpreted to reflect congressional intent to restrict marijuana use to limited research settings.

In its interpretation of the CSA, the Supreme Court has noted that, "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lessor schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study."[116] Regardless of the actions of the states, marijuana remains illegal under federal law, and efforts to remove its classification as a Schedule I narcotic have been completely unsuccessful.[117] However, the provisions of the CSA have been carefully spliced by courts to determine the extent of preemption on the issue of drug policy, especially in light of the traditional assumption against preemption in legislation impeding on areas of states' historic police powers, criminal sanctions for drug offenses, and medical care.

In *San Diego v. San Diego NORML*, the court cited the party's stipulation and wide jurisdictional agreement that the CSA contains an anti-preemption clause in section 903, acknowledging:

> Congress' statement in the CSA that "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter" demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances.[118]

The wide acceptance of section 903 of the CSA as an anti-preemption clause lends support to the idea that states have an amount of discretion in enacting medical marijuana policies. The rejection of express and field preemption means S.B. 129 will only be preempted by the CSA if compliance with both the CSA and S.B. 129 is impossible (conflict preemption), or if S.B. 129 poses an obstacle to the full objectives and purposes of the CSA (obstacle preemption). S.B. 129 could also be blocked from full implementation by the Drug-Free Workplace Act.

116. Gonzales v. Raich, 545 U.S. 1, 14 (2005).

117. *See* John Hoeffel, *U.S. Decrees That Marijuana Has No Accepted Medical Use*, L.A. TIMES.COM (July 9, 2011), http://www.latimes.com/news/local/la-me-marijuana-20110709,0,1346255.story.

118. County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 476 (Ct. App. 2008) (citations omitted).

2. The Federal Drug-Free Workplace Act

The Drug-Free Workplace Act of 1988[119] ("DFWA") requires individuals and organizations that receive federal grants or obtain federal contracts to certify that they provide a drug-free workplace by "notifying employees that the unlawful manufacture, distribution, . . . possession, or use of a controlled substance is prohibited in the [grantee's or contractor's] workplace."[120] The DFWA defines a drug-free workplace as "an entity at which employees of such entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance."[121] The repercussions for violation of the DFWA is the suspension of payment, the termination of the contract or grant, and the disbarment of the contractor's or grantee's eligibility for participation in the contracting or grant process in the future.[122] Violations of the DFWA will be found where a contractor or grantee made a false certification of compliance, where they have violated any of the requirements of the DFWA,[123] or where so many of the contractor or grantee's employees have been convicted of drug law violations that there is a strong indication "that the contractor has failed to make a good faith effort to provide a drug-free workplace as required."[124] The DFWA does not contain a preemption clause; therefore the only ways an employer complying with S.B. 129 could be found to be in violation of the DFWA is by falsely certifying compliance or through a conflict arising from simultaneous compliance with S.B. 129 and the DFWA, which would prevent an employer from accommodating a qualified patient employee's off-duty, off-premises use of medical marijuana and obtaining certification under the DFWA.

In order to make a prediction of the likely outcome of a preemption challenge to S.B. 129 under state and federal law, it will be helpful to examine two prior preemption determinations of California's medical marijuana laws and how judges have interpreted the legality of California's medical marijuana system. Then, a conclusion may be drawn regarding the possible preemption of S.B. 129 by either the CSA or the DFWA.

119. Drug Free Workplace Act of 1988, 41 U.S.C. §§ 701–07 (2006).

120. *Id.* § 702(a)(1)(A).

121. *Id.* § 706(1).

122. *Id.* § 702(b)(1).

123. *Id.* § 702(b)(1)A).

124. *Id.* § 702(b)(1)(B).

a. *County of San Diego v. San Diego NORML*

The *County of San Diego v. San Diego NORML* court held that the identification card requirement imposed on California counties by the MMP was not preempted by the CSA.[125] In addressing conflict preemption, the court relied heavily on *Gonzales v. Oregon*[126] where the U.S. Supreme Court held the CSA's preemption clause demonstrated Congress "explicitly contemplates a role for the States in regulating controlled substances."[127] The *NORML* court took specific notice of Justice Scalia's dissent in *Gonzales*, in which he argued that section 903 of the CSA was inapplicable to the majority opinion because section 903 only preempted state laws that affirmatively mandated conduct that violated federal law.[128] As the MMP did not require the counties to do anything other than issue identification cards, which is not in itself conduct that violates federal law, the MMP was not rendered void through conflict preemption.[129] Working from the assumption the states had a contemplated role in the shaping of their particular drug policies, the *NORML* court determined it was possible to be fully in compliance with both laws at the same time, negating any conflict preemption.[130]

In addressing obstacle preemption, the *NORML* court looked to congressional intent when enacting the CSA.[131] As the MMP and the CSA regulate an area traditionally occupied by state regulation, medical practices and state sanctions for drug possession, the court relied on the presumption that "[w]hen Congress legislates in a 'field which the states have traditionally occupied[,] . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[132] The court found that because the anti-preemption clause of section 903 expressly limits preemption to "only those state laws in which there is a *positive conflict* between [the federal and state law] *so that the two cannot consistently stand together*,"[133] Congress only intended to preempt state laws that could not be followed

125. County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 484 (Ct. App. 2008).
126. 546 U.S. 243 (2006).
127. *Id.* at 251.
128. *Id.* at 289–90 (Scalia, J., dissenting).
129. *San Diego NORML*, 81 Cal. Rptr. 3d. at 481.
130. *Id.*
131. *See id.* at 477–78.
132. *Id.* at 478 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
133. *Id.* at 479.

without violating federal law and did not intend to "supplant all laws posing some conceivable obstacle to the purposes of the CSA."[134] The court stated that because "section 903 preserves state laws except where there exists such a *positive* conflict that the two laws *cannot* consistently stand together, the *implied* conflict analysis of obstacle preemption appears beyond the intended scope of . . . section 903."[135] The court further held that even if obstacle preemption was implied by the statute, the MMP did not pose a significant obstacle to the CSA.[136] The CSA's purpose is to combat recreational drug use, not to regulate the state's medical practices. Since the MMP sought only to streamline the identification process of exempted patients, the MMP did not present a substantial obstacle to the purposes of the CSA.[137] Even if Congress had intended to preempt state laws that presented a significant challenge to the purposes of the CSA, the mild requirements imposed by the MMP would not violate it.

In the most recent Supreme Court case on the subject of medical marijuana, *Gonzales v. Raich*,[138] the Court found that Congress could preempt state medical marijuana laws but did not extend their holding to say the CSA did in fact preempt California medical marijuana laws.

b. *Gonzales v. Raich*

The U.S. Supreme Court addressed Congress' power to regulate intrastate marijuana cultivation and use under the Commerce Clause of the Constitution in *Raich*. The Court stated the CSA was "a valid exercise of federal power" and that "Congress's power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally."[139] The Court did not specifically hold state medical marijuana laws would be preempted by the CSA, merely that Congress has the power to regulate such activities.

The plaintiffs, Angel Raich and Diane Monson, were California residents and qualified patients under the CUA.[140] On August 15, 2002, county deputy sheriffs and federal Drug Enforcement Administration agents went to Monson's home where she cultivated marijuana

134. *Id.*
135. *Id.* at 479–80.
136. *Id.* at 481.
137. *Id.* at 483.
138. 545 U.S. 1 (2005).
139. *Id.* at 9.
140. *Id.* at 6.

for her own medical use.[141] The county deputies concluded after an investigation that Monson's use of the marijuana was entirely lawful as a matter of California law; however, the federal agents seized and destroyed her six marijuana plants.[142] Raich and Monson brought suit, claiming that CSA's "categorical prohibition on the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress's authority under the Commerce Clause."[143]

The *Raich* Court specifically relied upon Congress' power to regulate purely local activities that, in the aggregate, have a substantial effect on interstate commerce.[144] The Court noted "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[145] The Court then applied this reasoning and stated that as the primary purpose of the CSA was to control the supply and demand of controlled substances in both legal and illegal drug markets, the Court had no trouble concluding that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[146] The majority opinion, authored by Justice Stevens, found that even the local, non-commercial cultivation of marijuana was an activity that was "quintessentially economic."[147] As an economic activity, it is well within the proper scope of congressional regulation.[148] The majority rejected Raich's and Monson's argument that marijuana possession and cultivation in accordance with state law was beyond the reach of the federal government's regulation and prohibition.[149] The Court cited the Supremacy Clause and stated "[i]t is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be."[150] The Court did not specifically rule on the preemption of the CUA by

141. *Id.* at 7.
142. *Id.*
143. *Id.* at 15.
144. *Id.* at 17 (quoting Wickard v. Filburn, 317 U.S. 111, 128–29 (1942)).
145. *Id.* at 18.
146. *Id.* at 19.
147. *Id.* at 25.
148. *See id.* at 25–26.
149. *See id.* at 23–26.
150. *Id.* at 29 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

the CSA since Monson and Raich only argued the CSA was unconstitutional due to its regulation being beyond the reach of Congress's Commerce Clause authority.[151] The majority simply stated that Congress was able to regulate the cultivation of marijuana through the Commerce Clause, and, as such, there was no constitutional violation in the application of the CSA to Monson and Raich.[152]

In a strongly worded dissent, Justice O'Connor stated she felt the majority overlooked the role of states as laboratories, stating "[o]ne of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[153] Justice O'Connor expressed disapproval of the majority decision which:

> [S]anctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession and use of marijuana for medical purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.[154]

Justice O'Connor emphasized the distinction between recreational and medical use of marijuana and added the CSA even contains a medical necessity exception,[155] though not one that applies to Schedule I narcotics.[156] She recognized the specific conduct at issue in the case was the "personal cultivation, possession, and use of marijuana for medicinal purposes" as legalized by the state of California.[157] Justice O'Connor then concluded that homegrown cultivation and personal possession of marijuana has no commercial character and has not been shown to have a substantial effect on interstate commerce.[158] She further claimed that the CSA is too vague and general to show the federal regulatory scheme for recreational drug use will be undermined if the CSA is not applied to qualified patients like Raich and Monson.[159] Justice O'Connor correctly found that the means of regulation and application of the CSA to qualified patients was too attenu-

151. *See id.* at 8.

152. *Id.* at 22, 25–26.

153. *Id.* at 42 (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

154. *Id.* at 43.

155. *See* 21 U.S.C. § 812(1)(b) (2006); *but see id.* §§ 812(2)(b), 812(3)(b).

156. *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting).

157. *Id.* at 48.

158. *Id.* at 48, 50.

159. *Id.* at 55.

ated from the ends to be achieved—disrupting the market for illicit drugs—to stand.[160]

It is beyond dispute that Congress may regulate the field of medical marijuana in an attempt to stem the illegal drug trade. However, this does not mean that S.B. 129 will be preempted. As the Court did not reach that question, there is no bright line rule. It is still open to conjecture whether just because the federal government can preempt a state medical marijuana law, it will.

C. Specific Preemption of S.B. 129

1. The Controlled Substances Act

Full implementation of S.B. 129 will not be barred by the CSA. As the *NORML* court determined, the anti-preemption clause in section 903 of the CSA specifically contemplates a role for the states in defining their drug policy, and S.B. 129 does not run into problems of conflict or obstacle preemption as defined by the *NORML* court.[161] S.B. 129 does not conflict with the CSA because S.B. 129 does not mandate any behavior that would violate the CSA, nor is simultaneous compliance with both laws impossible. The duty of employers to accommodate the off-duty, off-premises use of medical marijuana by qualified-patient employees that would be imposed by S.B. 129 is not addressed by the CSA, clearly leaving room for state legislation and not posing a conflict to the full implementation of S.B. 129. Without specific and unavoidable conflict between the two laws, S.B. 129 does not run afoul of conflict preemption.

S.B. 129 does not pose an obstacle to the accomplishment of the purposes of the CSA, therefore S.B. 129 will not run into problems of conflict preemption. The CSA is intended to prevent recreational drug use, and marijuana use pursuant to a physician recommendation is not recreational drug use.[162] Requiring employers to accommodate such medicinal use would not frustrate the attempt to prevent recreational drug use, as S.B. 129 only requires accommodation of medical, not recreational, marijuana use. The *Raich* majority did state a central purpose of the CSA was to control the supply and demand of the illegal drug trade, and so Congress was able to regulate medical marijuana users to serve this purpose.[163] This implies that any state's

160. *Id.* at 56–57.

161. County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 478–82 (Ct. App. 2008).

162. *Id.* at 470.

163. *Raich*, 545 U.S. at 19.

medical marijuana laws that increase the supply or demand for controlled substances would be subject to obstacle preemption by the CSA. Requiring employers to accommodate qualified patient-employees' off-site and off-hours use of medical marijuana does not increase the supply or demand for illegal marijuana, as medical marijuana can only be obtained from registered dispensaries. S.B. 129 does not incentivize participation in a medical marijuana program in a way that would abet the illegal drug trade. Since S.B. 129 simply disallows workplace discrimination against qualified patient-employees, it is highly unlikely S.B. 129 will be found to be preempted by the CSA.

2. The Drug-Free Workplace Act

For many of the same reasons, S.B. 129 will not bring employers into conflict with the Drug-Free Workplace Act. As Justice Kennard aptly stated in her opinion in *Ross v. RagingWire*, the DFWA only speaks to use or possession *in the workplace* and is silent on the matter of employees' off-site use of drugs.[164] This reasonably implies employers could be lawfully required to accommodate such use without coming into open conflict with the DFWA scheme. If courts follow Justice Kennard's reasoning on this literal interpretation of the meaning of the DFWA, S.B. 129 poses no problem or conflict with federal policy. S.B. 129 specifically does not require employers to tolerate drug use in the workplace nor does it allow employees to be incapacitated at work due to off-site drug use.[165] This construction means that employers will be able to comply with the DFWA by certifying that they do not allow the use, possession, manufacture, or distribution of illegal drugs in their workplaces while still accommodating use by qualified patient employees.

Additionally, the purpose behind the DFWA is to prevent the provision of federal money to contractors and grantees who tolerate illegal drug use, possession, or distribution by their employees at the worksite.[166] S.B. 129 does not frustrate the purpose of the DFWA. S.B. 129 specifically states, "[n]othing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment."[167] Because employers will not be required to tolerate such con-

164. Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 213 (Cal. 2008).

165. S.B. 129, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

166. *See Ross*, 174 P.3d at 213 (Kennard, J., dissenting).

167. S.B. 129, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

duct in their worksites, they will not be forced to engage in conduct which frustrates the purpose of the DFWA schemes.

D. Additional Support for the Argument that S.B. 129 will not be Preempted

The preemption of S.B. 129 also seems unlikely considering the lack of challenges to other states' medical marijuana laws and the systemic refusal of the federal government to use its preemption power to prevent the implementation of other California state medical marijuana laws.

1. Rhode Island as a Test Case

Rhode Island currently has a law in place that prohibits discrimination in employment, housing, or education due a person's status as a qualified patient or their use of medical marijuana.[168] The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act states, "[n]o school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a [medical marijuana patient]."[169] Since its passage five years ago, the law's proscription of adverse employment action against qualified patient employees has not been contested in a single reported case.[170] While it is impossible to accurately predict the possible impact of a proposed law, it seems reasonable to argue that if employers were finding it impossible to comply with both state and federal law, a suit would have been filed to enjoin the application of the Rhode Island law to a given employer. The lack of litigation in Rhode Island supports the argument that employers have not found simultaneous compliance impossible and have not been overly burdened in accommodating medical marijuana users. As that has not happened, a reasonable inference may be drawn that the law has not caused this problem. There is therefore little reason to think that California's law, which proscribes the same conduct, would impose a heavy and unworkable burden on employers and lead to a preemption challenge.

168. Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS § 21-28.6-4 (Lexis 2010).

169. *Id.*

170. *Id.*; *see* Raich v. Gonzales, 500 F.3d 850, 865–66 (9th Cir. 2007) (citing Rhode Island's statute as an example of one among ten states that have passed decriminalizing use, possession, manufacture, and distribution of marijuana for the seriously ill); State v. Berringer, 229 P.3d 615, 621 n.3 (Or. 2010) (citing Rhode Island's statute as an example that Rhode Island specifically extends protections to patients who obtain registry identification cards or other functionally equivalent authority for their states).

2. Refusal of the Department of Justice to Prosecute Patients Complying with State Law

On October 19, 2009, the Attorney General's Office released a memorandum for selected United States Attorneys detailing the administration's system of investigating and prosecuting medical marijuana users.[171] The memo offers guidance and states that so long as people are in compliance with state medical marijuana laws, they will not be the subject of federal prosecution.[172] The memo makes clear that the disruption of the illegal drug trade remains the highest priority of the Department of Justice but that "pursuit of [those] priorities should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[173] The memo is clear that nothing in the guidance will prevent the investigation and prosecution of individuals who use the medical marijuana laws as a pretext for unauthorized cultivation, possession, or sale of marijuana.[174] The Department also retains the right to initiate investigation and prosecution "even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests."[175]

This memo supports the idea that state medical marijuana laws are not automatically preempted by the CSA. It is unlikely that the Justice Department would give discretion to U.S. Attorneys in determining whether to prosecute medical marijuana patients if the state laws were in direct conflict with federal policy. This in turn supports the argument that states have discretion in setting their own drug policies. It further suggests that if S.B. 129 is passed, the federal government will not have any interest in prosecuting employers who are complying with the state requirements of non-discrimination against medical marijuana users for abetting a violation of the CSA. Without the fear of federal prosecution for conduct mandated by state law, employers will be able to make the accommodations required by S.B. 129 without fearing federal liability for compliance with state law.

171. Memorandum from General David W. Ogden, Deputy Attorney General, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, to United States Attorneys (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

3. Veterans Health Administration Changes Medical Marijuana Policy

On July 10, 2010, the Veterans Health Administration ("VHA") issued a similar memo providing guidance to VHA medical facilities with patients who use medical marijuana legally under state law.[176] Prior to this directive, veterans who tested positive for marijuana use risked the loss of their VHA benefits, including the loss of prescription pain medication, regardless of their status as a qualified patient under state law.[177] The directive states that "patients participating in state medical marijuana programs must not be denied VHA services,"[178] although it does caution that doctors made aware of treating patients using medical marijuana may want to change treatment options. While VHA doctors are not allowed to prescribe marijuana to patients and VHA pharmacies will not fill such prescriptions,[179] this is a large step forward in recognizing the need for policy changes which do not force patients to choose between receiving medical care they are entitled to due to their veteran status because of their choice to use medical marijuana.

It is especially striking that this directive comes from the federal VHA. The federal government's willingness to allow persons receiving federal benefits to use medical marijuana in compliance with state law suggests that the government will not have a strong interest in prosecuting the employers who employ these patients. The VHA's willingness to embrace non-traditional medical treatments and allow veterans to participate in medical marijuana programs under state law may signal a shift in federal policy towards medical marijuana laws, which will prevent any preemption of S.B. 129.

E. Conclusions on the Possible Preemption of S.B. 129

S.B. 129 will not be preempted by federal law. As discussed above, employers will not be forced to decide between compliance with the state law and compliance with the CSA or the federal DFWA, meaning that conflict preemption will not prevent the full implementation of

176. *See* Veterans Health Administration Directive 2010-035, Medical Marijuana (2010) [hereinafter VHA Directive, Medical Marijuana], *available at* http://www.vawatchdog.org/10/nf10/nfjul10/jul10files/medicalmarijuanadirectiveVA.pdf.

177. Dan Frosch, *V.A. Easing Rules for Users of Medical Marijuana*, N.Y. TIMES, July 24, 2010, at A1, *available at* http://www.nytimes.com/2010/07/24/health/policy/24veterans.html?pagewanted=all.

178. VHA Directive, Medical Marijuana, *supra* note 176.

179. Frosch, *supra* note 177.

S.B. 129 if it is signed into law. Neither does S.B. 129 pose an obstacle to the achievement of the full purpose of the CSA or the DFWA, as it does not increase the illicit drug trade, and it does not impose a requirement on employers to tolerate drug use in the workplace. In addition, the systematic refusal of the federal government to prosecute medical marijuana users acting in compliance with state law leads to the reasonable conclusion that employers will not face federal sanctions for complying with the requirements of S.B. 129. This lack of conflict with federal law and the disinterest of the federal government in prosecuting such cases clearly show that if S.B. 129 is signed into law, employers will have no reason not to comply with it.

III. Public Policy Supporting the Passage of S.B. 129

Public policy strongly favors the implementation of S.B. 129. First, as Justice O'Connor stated in her dissent to the *Raich* decision, one of the advantages of the federalist system is to allow the voters of a state to enact policies and act as laboratories for the rest of the country.[180] Novel ideas can be experimented with by the states without risking the integrity of the federal system. If an experiment does not succeed, only a single state will bear the consequences, not the entire nation. If an experiment succeeds, it can serve as a model for similar policies to take place at the federal level and affect the entire nation. Without the ability of states to act in this capacity, new and interesting ideas may never be tried, and the legal landscape of the nation could stagnate for fear of the possible effects of a given change.

S.B. 129, in conjunction with the Rhode Island law, could act to inform national policy on the need to prevent discrimination against users of medical marijuana in the workplace. Passage of S.B. 129 could also lend support to the idea that medical marijuana use could be legalized nationally by showing the types of regulatory actions to prevent abuse of such a system. Without the ability to try novel experiments such as medical marijuana schemes, the purpose of federalism and states' rights is undermined.

Federalism as a justification for S.B. 129 is further supported by Justice Thomas's dissent in *Raich*.[181] Justice Thomas articulated the traditional authority of the states to regulate the health, safety, and morality of its citizens and to enforce criminal sanctions within its borders, and he asserted that the application of the CSA in that case tram-

180. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).
181. *Id.* at 57 (Thomas, J., dissenting).

pled on these traditional powers.[182] This supports the proposition that states may use their traditional police powers to set policies that comply with the wishes of that state's citizens.

S.B. 129 regulates medical decisions made by the citizens of California, delineates the criminal sanctions, or lack thereof for such use, and sets standards for employers operating in the state. All of these regulations fall firmly within the traditional police powers of the state and provide an interesting experiment with the potential to shape national policy in the future. Without the bulwark of the courts standing against imposition by federal regulations, the roles of the states in forming policy is diminished, and one of the true strengths of the federalist system is lost.

S.B. 129 also supports patient privacy and the right to make medical decisions consistent with a person's autonomy over his or her own body. It would prohibit the type of adverse employment actions that can make qualified patients choose between their preferred method of symptom care and their jobs, a decision that is cruel to impose upon people suffering from illness and disease. Disallowing workplace discrimination against qualified patients is also well within the spirit of the CUA. California voters approved the CUA to allow qualified patients to use marijuana to alleviate the symptoms of their medical conditions. In so doing, it is unreasonable to assume, as the majority in the *Ross* court did, that the voters wanted to remove criminal sanctions from medical marijuana use but had no problem allowing those same patients to be sanctioned in the workplace through discrimination for their medical marijuana use. The signing of S.B. 129 into law would allow the purposes of the CUA to be fully realized by allowing qualified persons with medical conditions to use medical marijuana without fear of any repercussions for that choice.

On a more pragmatic note, S.B. 129 also fulfills the public policy goal of ensuring that as many Californians as possible can obtain gainful employment. By allowing discriminatory practices against qualified patients to continue, the state of California is preventing capable adults from entering the workforce. This not only prevents the state from collecting income tax from those persons, it prevents them from spending money in the economy and potentially thrusts the burden of their care on the state and the taxpayers. By signing S.B. 129 into law, the state of California will be removing a roadblock to employment

182. *Id.* at 66.

for qualified patients, an act that benefits the patients and the state of California.

Conclusion

Jane Smith is still searching for employment. Her medical decisions concerning her medical marijuana use continue to be the largest barrier to finding a job. At the time of this Comment she has decided that she must forego her chosen pain management in order to increase her chances of finding a job and to end the consistent questioning she undergoes during interviews. Her frustration at having her private medical decisions forming the basis for decisions not to hire her have convinced her that, for the time being at least, she cannot have both a job and medical autonomy. This decision is difficult and she fears the mental and physical symptoms of her PTSD will return when she stops using marijuana completely. However, her greater fear is her continuing inability to provide for herself and her family. This decision plagues thousands of Californians just like Jane and is one that no one should be forced to make. Without the passage of S.B. 129 and the resulting decision by the California Legislature to end workplace discrimination against qualified medical marijuana patients, the choice between legal medical treatment and gainful employment will continue to be one that singles out medical marijuana patients and foists a choice on them that, as Justice Kennard stated in the *Ross* decision, is a cruel one that California voters could not have intended when they passed the CUA.[183]

In the sixteen years since the passage of the CUA, California has struggled to define the parameters of acceptable medical marijuana use and possession. Part of this struggle has been the identification of the obligations of non-marijuana users to qualified patients. By signing S.B. 129 into law, the California State Legislature would be providing a great deal of clarification on this point and would be making a decision consistent with federal law and the best interests of the qualified patient population of the state. As has been demonstrated in this Comment, passage of the bill will not overly burden California employers through changes to the law and will not place them in conflict with federal regulations. S.B. 129 will not face a successful preemption challenge, and the federal government has given no indication of an interest in prosecuting employers for compliance with this new law.

183. Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 212 (Cal. 2008) (Kennard, J., dissenting).

Public policy strongly supports the implementation of S.B. 129, and the benefit it would bestow on qualified patients is vast. As there is no reason to prevent its full implementation, S.B. 129 should be passed and signed into law in the state of California.